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## COERCED PARENTHOOD AS FAMILY POLICY: FEMINISM, THE MORAL AGENCY OF WOMEN, AND MEN'S "RIGHT TO CHOOSE"

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### ABSTRACT

Part of what makes human agency moral is the demand that individuals think through their choices and, to the extent that they are choices made freely and unilaterally, that they shoulder most if not all of the consequences that visit upon those choices. It is not uncommon for the state to intervene in this moral field, shifting to choice-bystanders or the entire society the consequences attracted by free and unilateral choices individuals make. However, counter-intuitively, sometimes this burden reallocation operates to discount the moral agency of the individual whose choice was free and unilateral. Indeed, in a world of subtle forms of domination, disrespect for the moral agency of certain groups sometimes takes the form of a privilege that is benign on the surface while profoundly undermining in its long term impact on those groups' claims to equal moral agency. This article argues that there is an aspect of women's reproductive privileges that undermine their equal moral agency. Unfortunately, this phenomenon of subjugation-through-rights-guarantees has escaped feminist analysis of reproductive rights.

This article focuses on one instance of this phenomenon. The Supreme Court has established and regulated a basic privacy right to reproductive

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choices. However, men are not currently given similar choices and are compelled to parent as an effect of state policy that gives women unilateral reproductive choices in several instances, women are deprived of full responsibility for the consequences of those choices and surrender a significant dimension of their moral agency to a type of disempowering paternalism. This article argues that, as a principle of equality, men and women should be given similar choices regarding their reproductive destinies and correspondingly face the consequences for their choices.

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## INTRODUCTION

There are three defining moments in the intellectual history of modern feminism. The first of those moments can be thought of as traditional feminism and is embodied in the foundational works of John Stuart Mill and Mary Wollstonecraft, to mention the most influential authors. The target of these feminists was to take down the negative, discriminatory legal barriers preventing women's equality. In doing so, they advanced the novel theory that women were different from men not because of any essential comparative inability, but because of the artificial barriers that negated their full realization of the self.<sup>1</sup> Notably, the first moment of feminism had in many respects—though its methods and normative goals would prove insufficiently emancipatory—greater universalistic potential than did the moment following it. This universalistic potential can be translated into a robust and encompassing view of equal protection in American constitutional law.

With the increasing removal of many of the negative, discriminatory legal barriers, feminism evolved to become more subtle and searching in its criticism of the barriers to women's emancipation. The discovery here

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1. John Stuart Mill (and Helen Taylor) thought that women were not fundamentally different than men; it was only that they lacked educational opportunities. Thus, if women were given the same opportunities as men, they would therefore be equals of men. This was in contrast to Rousseau's idea that women should be educated as women because of their essential differences. *See generally* JEAN-JACQUE ROUSSEAU, *EMILE: OR, ON EDUCATION* (Allan Bloom ed. & trans., Basic Books 1979) (1762).

was one the social theorists of the nineteenth century had already made in their interrogation of the causes of enduring social inequalities: formal equality is not enough. That is, with several of the goals of the first moment accomplished, there were still profound inequalities between men and women. Thus, in its second moment, feminism focused on the more opaque structural causes of inequality. There were innumerable terms and sub-terms for these new feminisms — for example: radical feminism, cultural feminism, anti-essentialist feminism, critical race feminism, sex positive feminism, etc. — and the various epistemological, ontological, causal, and normative views of each varied greatly.<sup>2</sup> However, a common accusation among second-generation feminists was that society/law/politics/economy/culture was inherently male-gendered, and no surface reform would change that.<sup>3</sup> The deeper criticism of second-moment feminists did a magnificent job of advancing the cause of women, but failed to advance feminism as a universalizable, critical, and constructive approach to injustice and subjection. In the denunciation of genderization of society, whole continents of social injustice and oppression simply escaped them. With this view, feminism predicted its own marginalization as a mere group concern.<sup>4,5</sup>

A third moment of feminism, initiated predominantly by Janet Halley, turned onto itself and problematized the insufficient universal potential of the inequality claims of the first two moments.<sup>6</sup> This latest moment understands the unavoidable connections between one group's claims to equality and emancipation and everyone else's claims to the same. In society, we are all on the same boat. This paper acknowledges that a break should be taken from the traditional instantiations of "feminist" discourse in order to discuss what it would mean for women to possess equal agency and responsibility, while still maintaining a critical eye on the systems that women are now not only subject to, but which women are also creating. As it turns out – and who is surprised? – not all injustice and oppression

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2. See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX*, (Constance Borde & Sheila Malavony-Chevallier trans., Vintage Books 2011) (1949); ANDREA DWORKIN, *INTERCOURSE* (Basic Books 2007) (1987); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1988); LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (3d. ed. 2009). These feminists accomplished much in the fight against sexual harassment, rape, exploitation, sex trafficking, etc. They began to address the structural issues inhibiting women's liberation. Their struggle was necessary, a "consciousness raising" and powerful step, but it was not the final step in achieving full equality for women.

3. See, e.g., CATHARINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* (2007).

4. See, e.g., CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* (2003) (arguing that feminism must be a universal claim).

5. Some in this era felt that feminism was stalled (CATHERINE MACKINNON, *ARE WOMEN HUMAN?* 2007) and, indeed, in many ways it was.

6. See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008) (arguing that feminism cannot be the universal sexual ideology of the Progressive Left).

can be reduced to the subjection of women. Feminism will leave its self-imposed marginalization only when its claims to empowerment and equality are carved in universalizable terms that can be extended to all victims of injustice and oppression, from unparented children, to the disabled, to the poor and the stateless.

Some scholars make a distinction between “equity feminism” and “gender feminism.”<sup>7</sup> Gender feminism takes on the view that the world is patriarchal, and that women are victims of this hegemony.<sup>8</sup> I submit that, though there are certainly inequalities heretofore in existence, women are now able to act as *agents* in their own lives — they are not simply victims.<sup>9</sup> Equity feminists, on the other hand, believe their views harken back to the good old times of first moment feminism, and that their normative objective is rightfully limited to seeking legal equality in a world where women have never fully had equal legal standing.<sup>10</sup> But the social systems and structures that women inhabit, and through which legal and feminist theories operate, are enormously complex, a complexity unaccounted for in this view.<sup>11</sup> It is undeniable that the place of women in many parts of the world has risen dramatically. Feminist activism has produced real gains for women, but these gains are incomplete. In many ways, women and men are still different in the way that they think of themselves and in the way in which they are perceived.<sup>12</sup> To explain the process in terms of the Hegelian dialectic, these partial victories of feminism can be viewed as a partial synthesis through which a new feminist thesis is created.<sup>13</sup> In light of this constant renewal of feminist theses, feminist theory must constantly continue to meaningfully self-critique.<sup>14</sup>

While women are not the only voice, women are no longer simply voiceless. While structural inequalities still exist, women now are part of the power structure. Feminist theory must take steps to parcel the traditional role of victim, and must move towards universal emancipation. True emancipation must always have its eye on the universal and where it

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7. See, e.g., CHRISTINA HOFF SUMMERS, WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN 22 (1994).

8. See *id.* at 22-23.

9. There is a divide on this point among second-moment feminists. Where MacKinnon points out that the legal system is inherently “male,” MACKINNON, *supra* note 2, at 43. I submit that the ownership of the social structure is fluid.

10. See, e.g., HALLEY, *supra* note 6, p.14.

11. See, e.g., HALLEY, *supra* note 6., p.14

12. The essentialist, evolutionary, or biological aspects of these differences all having been thoroughly contested, but nonetheless *existing* in the normative sense.

13. See Patricia A. Cain, *The Future of Feminist Legal Theory*, 11 WIS. WOMEN’S L. J. 367, 372 (1996)

14. See Patricia A. Cain, *The Future of Feminist Legal Theory*, 11 WIS. WOMEN’S L. J. 367, 372 (1996) (anti-essentialist feminist reader). In the context of feminist legal theory, theorists must not lose touch with women’s real life experiences. They must constantly be aware of a tendency of new law to be forced into old frameworks.

does not, “emancipation” becomes only a ruse. The flow of power is hard to change, and a less-than-complete version of equality can easily become a consolation prize, a covert tool of the same oppression that it portends to controvert.

How can women answer for the enormous gains and continue to strive forward, all the while propagating their liberation *as part of a universal program of emancipation for all*? After all, we do not seek freedom only to oppress. It is precisely because of the enormous and very real gains made for women in an almost unbelievably short number of years that feminists must remain extra-vigilant about the very well from which feminism springs—that of gender. If women are to move forward in the world, it must not be deigned through the lens of that which is identified as “female,”<sup>15</sup> but rather through the advancement of universalizable claims. Women do not seek emancipation because they are women, but rather because they are human, and just as human as any other. This is the only way to avoid the marginalization of the other, and correspondingly, the marginalization of feminism.<sup>16</sup>

I argue that the universalizable core of feminism’s calls for justice and equality is best understood as a claim to equal moral agency. The way to universalize feminism is to strive so that no one’s agency is counted out, and everyone is equally empowered and equally responsible. Hence, *moral agency* can be used as a litmus test in determining the universality of feminist claims.

In this article, I seek to advance the third moment of feminism—a critical take on a classical theoretical movement—by deepening it with a search for that which is the universalizable core of feminism. With this in mind, analysis of feminism and feminist theory shows that feminism is a struggle for equal, empowered moral agency.<sup>17</sup> In order to test this concept, I apply the legal and theoretical indications of third moment feminism, conscious of moral agency as a universalizable core, to analyze a political issue of human reproduction and the choices, responsibilities, and rights afforded to women as well as men.

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The right to determine whether one becomes a parent is one that is constantly debated in legislatures, courts and public opinion fora. A “woman’s right to choose” being the operative catchphrase, the rhetoric involved is heavily centered on femininity and motherhood while father-

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15. A paradoxical term, anyhow.

16. The “other,” I suppose, being present and integral in all emancipatory movements.

17. Randall P. Bezanson, *Emancipation as Freedom in Roe v. Wade*, 97 DICK. L. REV. 485, 493–497 (1993).

hood is relegated to a background aspect and secondary status.<sup>18</sup> In this paper I discuss the existing legal and constitutional contours of the right to parenting choice as a policy. Normatively, I argue that the current policy orientation must be changed in order to extend to men prerogatives equivalent to those granted women in the reproductive domain, showing why anything less than equality in the right to choose is unacceptable and harmful to women's, as well as men's, equal moral agency.

The family is a political institution, and as such, is historically shaped by a variety of legal and economic policies.<sup>19</sup> I argue that a critical feminist approach to reproductive choice as policy should reject regulation that spares women of the consequences of their free and unilateral choices by allowing them to shift part of the burdens entailed in their choices to the biological father of the child they give birth to.<sup>20</sup> A central aspect of moral agency is the expectation that the moral agent ordinarily shoulders the consequences of her choices.<sup>21</sup> Reproductive and parenting policies that allow women to unilaterally impose parenthood on others violate their moral agency by outsourcing to others the consequences of their choices. These policies constitute an especially subtle form of subjugation—one that discounts moral agency through the veiling mechanism of granting a right.

Although this may not always have been clear in feminist thought, the most cogent way to interpret women's struggle through history is to reconstruct it as a struggle to have their moral agency respected and recognized as equal to that of men.<sup>22</sup> A late-modern, critical feminism should do justice to women's struggle for emancipation by rejecting any policy that diminishes their equal moral agency, even—or especially so—when it is done under the cloak of extending to women a constitutional right.<sup>23</sup>

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18. Adrienne D. Gross, *A Man's Right to Choose: Searching for Remedies in the Face of Unplanned Fatherhood*, 55 *DRAKE L. REV.* 1015, 1034–35 (2007).

19. For further explanation on the normative foundations and expression of family as policy, see GEORGE WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 199 (2003); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989) and Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to Be Adopted*, 55 *N.Y.L. SCH. L. REV.* 701 (2010/2011); see also *CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND* (Sanford N. Katz et al. eds., 2000). Social theoretical analyses of intimacy and affection as they evolved together with the modern family can be found in NIKLAS LUHMANN, *LOVE AS PASSION: THE CODIFICATION OF INTIMACY* (1998) and ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE, AND EROTICISM IN MODERN SOCIETIES* (1992).

20. Cf. *Rivera v. Minnich* 483 U.S. 574, 580 (1987) (“[T]he putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law.”).

21. Bezanson, *supra* note 17, at 504.

22. For those that adopt a “recognition” frame of analysis with a Hegelian pedigree, see generally DE BEAUVOIR, *supra* note 2, and AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (Joel Anderson trans., Polity Press 1995) (1949).

23. See, generally, HALLEY, *supra* note 6,



Because of the legal and social presumptions present concerning married men and their paternal duties,<sup>24</sup> this paper will consider a hypothetical adult and unmarried man. That is not to say that neither married men nor minor males have rights of reproductive autonomy; it is only to say that either status makes the territory considerably murkier and does not illuminate the central thesis advanced in this paper.

Likewise, this paper does not address the subject of unmarried men and their parental status rights towards a biological child that they affirmatively want to parent. This paper primarily discusses the policies that intervene in a negative choice: biological fathers who do not wish to become legal and social fathers and the rights that they have to reproductive autonomy as a corollary to women's full-fledged moral agency. Of course, the flip side to negative choice is positive choice. Reproductive autonomy in providing that a negative choice may be made likely also dictates that a positive choice may be made with regard to a male becoming the legal and social parent of his biological child. Like any interest or right, this one would be subject to a number of requirements and conditions—most obviously, that abuse not be present, that the child was not a product of rape, etcetera. The statutory and case law are quite varied in this area, reflecting different policy views.<sup>25</sup>

The argument unfolds from here in the following sequence. Part I presents a brief analysis of the case law addressing reproductive rights. In the American context, this body of jurisprudence is central to the relevant reproductive policies in question. Utilizing a feminist-oriented perspective, in Part II, I articulate and defend alternative conceptions of the ethics of child bearing. In Part III, I form a value conception of the rights of the fetus and child as they relate to the parents in the context of reproductive choice. Further conceptions regarding a male's role in reproduction and parenthood are then contrasted with the understandings and assumptions that are commonly made regarding parenthood and the choices that lead individuals to become parents. Finally, I outline a framework for thinking about the issue of autonomy in reproductive decision-making as a question of empowerment of and equality among women and men as moral agents.

A note on terminology: fathers and mothers may be one or a combination of the biological, legal or social types. Biological fathers and mothers are those individuals whose genetic material was employed in the child's conception.<sup>26</sup> Legal fathers and mothers are those recognized by the state as fathers and mothers (with all of the legal rights and responsibilities de-

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24. See, e.g., *Richard B. v. Sandra B. B.*, 625 N.Y.S.2d 127, 129 (1995).

25. Considerable literature may be found in the area of paternal rights as far as men choose positively to become paternal figures. Also, it seems that fathers may only relinquish parental rights in the case of adoption and possibly in other rare instances where they are deemed unfit by a judge, though this varies according to state law.

26. BLACK'S LAW DICTIONARY 1222 (9th ed. 2009)

rived therein).<sup>27</sup> Social parenthood represents the social consequences and understandings that one is subject to after he or she acts as a parent according to the applicable social norms.<sup>28</sup>

#### DISCUSSION

In the case that a biological father does not actively seek a role in his child's life, the child's mother may choose not to compel their offspring's biological father to become a father in the legal and social sense; however, she may also affirmatively choose to impose legal parentage.<sup>29</sup> In order to receive full benefits from the Temporary Assistance for Needy Families program ("TANF"), all states require mothers to reveal the identity of the purported father.<sup>30</sup> The rationale for this policy lies in allowing states to force biological fathers to pay child support, thereby reducing the amount of resources required from the state and the mother to support the child's needs.<sup>31</sup> Although states are required to have a "good cause" exception to this rule for fathers who may be abusive or children who were the product of rape or incest,<sup>32</sup> all states reduce the amount of TANF payments from twenty-five to one hundred percent if a woman does not cooperate with the requirement to reveal the father's identity.<sup>33</sup> In addition, the Federal Of-

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27. *Id.*

28. For a nuanced analysis of the meaning of parenthood, *See, e.g.*, ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (1999).

29. *Office of Child Support Enforcement*, ADMINISTRATION FOR CHILDREN & FAMILIES, <http://www.acf.hhs.gov/programs/css/about> (last visited Oct. 22, 2012).

30. 45 C.F.R. 264.30 (2013).

31. SUSAN PRICE, CONNECTICUT GENERAL ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH, OLR RESEARCH REPORT: LIMITS ON PUBLIC ASSISTANCE BENEFITS WHEN MOTHER REFUSES TO IDENTIFY CHILD'S FATHER, 2011-R-0130 (2011), *available at* <http://www.cga.ct.gov/2011/rpt/2011-R-0130.htm>. One type of requirement is the absolute information requirement. Under this, a custodial parent automatically loses TANF benefits when she fails to identify her children's fathers. *Id.* Very few states have adopted this requirement. *Id.* Another type of requirement is the checklist information policy, which requires custodial parents to provide specified items of information about the noncustodial parent, such as his name, Social Security number, employment, or relatives' names, however it also allows a woman to demonstrate that she lacks knowledge. *Id.* About one-quarter of states have adopted this approach. *Id.*

32. *Id.*

33. 42 U.S.C. § 608(a)(2) (2012). *See also*, PRICE, *supra* note 31. Good cause exceptions generally involve exceptions for physical or emotional harm to the custodial parent or child, rape, incest, or pending adoption. Some states, including Massachusetts, have more developed protocols for identifying domestic violence victims. [Daniel G. Saunders, Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations, 1998, [vawnet.org](http://vawnet.org)] A comprehensive list of state's requirements can be found in Vicki Turetsky et al., *State Child Support Cooperation & Good Cause: A Preliminary Look at State Policies*, CENTER FOR L. & SOC. POL'Y (April 1999), *available at* <http://www.clasp.org/admin/site/publications/files/0028.pdf>. See Appendix 6 for penalties, and Appendix 7 for good cause policies. There are also other sanctions for non-cooperation. About one-third of states have adopted a 25% penalty against the family, with a few others adopting another fixed penalty. *Id.* Another one-third of states have adopted full family sanctions, which makes the whole family ineligible for TANF benefits. *Id.* Another one-third has adopted progressive sanctions, which take two basic forms. The first is to increase the penalty amount with each occurrence of non-cooperation. *Id.*



fice of Child Support Enforcement was created with a primary purpose of helping mothers file for legal recognition of paternity so that they may collect benefits from a legal father.<sup>34</sup> No state in the United States currently offers an absolute “opt-out” for men who have unintentionally fathered a child.<sup>35</sup>

The Department of Children and Families in Vermont states the following:

For emotional and financial reasons, it is important to establish parentage as soon as possible after birth. A parent who pays support when a child is very young is more likely to continue paying support until the child is an adult. Even so, Vermont law allows parentage to be established until the child is 21.

It is important to establish parentage even if the alleged father is still in school, has no income, or has no health insurance. The court may order the father to pay a very small amount of support until he finishes school or gets a job. At that time, either parent can ask the Family Division of Superior Court to modify the support order to reflect the change.<sup>36</sup>

This language conspicuously reflects the coercive nature of forced parentage. For example, the father is referred to as “the alleged father” whom the “court orders” to do something.<sup>37</sup> At the same time, emotional and financial reasons are appealed to in encouraging mothers to use legal means to compel paternity. It is boldly stated that “children have the right to know who their parents are” as a reason to file a paternity suit, even though this is a *non sequitur*. Children do not need legal confirmation of a father’s identity in order to have adequate knowledge of their identity; likewise, in other types of parental identity cases such as adoption or genetic material donation, this type of “knowledge of identity” reasoning has

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The second is to lengthen the penalty period. *Id.* A few states have integrated the cooperation requirement into a personal responsibility or self-sufficiency plan, which will subject custodial parents to combined progressive work and child support penalties. *Id.*

34. See 42 U.S.C. § 651 (2012).

35. See Melanie B. Jacobs, *My Two Dads: Disaggregating Biological & Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006).

36. *Establishing Parentage*, DEPT. FOR CHILD. & FAMILIES (July 2013) <http://dcf.vermont.gov/sites/dcf/files/pdf/ocs/ParentHandbook.pdf>. See also *Little v. Streater*, 452 U.S. 1, 10 (1981) (“The nature of paternity proceedings in Connecticut also bears heavily on appellant’s due process claim. Although the State characterizes such proceedings as ‘civil,’ they have ‘quasi-criminal’ overtones. Connecticut Gen.Stat. § 46b-171 (1981) provides that if a putative father ‘is found *guilty*, the court shall order him to stand charged with the support and maintenance of such child’ (emphasis added); and his subsequent failure to comply with the court’s support order is punishable by imprisonment. . . .”) (internal citations omitted).

37. *Id.*

been unsuccessful.<sup>38</sup> This particular form of parenting policy frames and reflects the assumptions regarding coerced fatherhood. It assumes that men should and must be compelled to stand up to their parental “obligations” that have resulted with or without their intention or consent.

Under this rubric, any male who finds himself having fathered a child—whether as a product of a committed or a fleeting relationship—is subject to at least 18 years of financial support, should the mother choose to birth and raise the child.<sup>39</sup> This is decreed by each state through its laws, without consultation with the man and without regard to his own sentiments and actions.<sup>40</sup>

In contrast, the states grant a woman from conception until around 24 weeks of pregnancy (and beyond that when one considers the adoption option) the privilege—inclusively as a constitutional right—to choose whether or not to bear the burden of motherhood.<sup>41</sup> Furthermore, under the safe-haven laws of many jurisdictions, a woman may relinquish her parental rights and obligations by abandoning her newborn child in a “safe place,” like a police station or a church.<sup>42</sup> In spirit, and sometimes by statute as men are not always granted an analogous ability to take advantage of safe havens, these types of laws clearly cater towards aiding the female actor in her specific circumstance.<sup>4344</sup> The pregnant woman is given the

38. In one case, *Doe v. XYZ Co.*, 914 N.E.2d 117 (Mass. App. Ct. 2009), a court granted a right to medical information for a mother who conceived a child through sperm donation, but dismissed the case in regards to having paternity acknowledged.

39. See 42 U.S.C. §§ 651-69 (2012); 45 C.F.R. § 302.56 (2013) (requiring that states establish guidelines for setting and modifying child support award amounts in each state). Federal regulations implementing the Family Support Act of 1988 require that the guidelines established by each state “[b]e based on specific descriptive and numeric criteria and result in a computation of the support obligation.” 45 C.F.R. § 302.56(c)(2) (2013). See also Sarah K. Funke, Note, *Preserving the Purchasing Power of Child Support Awards: Can the Use of Escalator Clauses be Justified After the Family Support Act?*, 69 IND. L. J. 921, 925-26 (1994).

40. See 42 U.S.C. §§ 651-69.

41. State law varies on the time limit for abortions. Most states allow abortion until about 24 weeks, the third trimester, or until “viability”. For a complete listing of state regulations, see *State Policies in Brief: An Overview of Abortion Laws*, THE GUTTMACHER INST. (Oct. 1, 2013), [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf).

42. “Baby Moses”, or safe-haven laws have now been adopted by statute in all 50 states. *Infant Safe Haven Laws*, CHILD WELFARE INFO. GATEWAY (Oct. 7, 2013), [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/safehaven.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.pdf). In Texas, a qualifying baby must be under sixty days old and unharmed—harm including a positive toxicology screening. See, e.g., TEX. FAM. CODE §§ 262.302, 262.303, 262.308, 262.309, and 263.407 (2013). That these laws refer to the biblical story of a heartbroken mother who could hide her child from an unjust Pharaoh no longer, sending him adrift in a papyrus basket to be discovered (through the grace of God) by the Pharaoh’s daughter, is telling of the cultural cache of such laws. Both the biological and adoptive mothers of Moses are heroic actors. See *Exodus* 2:1-10.

43. The statutes are designed so that newborns may be dropped off or abandoned at a “safe place” without the mother suffering legal sanction—this statute is meant to protect unwanted newborns. As it is women who give birth, and therefore who are much more likely to have actual physical custody of a newborn, the statute was surely propagated with a woman’s circumstances in mind.

44. See, e.g., GA. CODE ANN. § 19-10A-4 (2013); TENN. CODE ANN. § 36-1-142 (2013). Two states allow only mothers to drop off infants (GA & Tenn). Maryland requires approval of the

decision-making power both for herself and for the male as to whether both will become parents. Given that many individuals consider parenthood (or non-parenthood) to be among one of the most fundamental and consequential events in their lives, this decision-making power is no small matter.

Nothing in the argument that this article advances calls for ignoring the biological realities of the differences between the sexes vis-à-vis reproduction. It would almost certainly be an affront to a pregnant woman that a man should have any say as to what she does with her body and the fetus she houses inside it.<sup>45</sup> For the male to be granted any right or ultimate say in the matter would be an abrogation of the woman's autonomy.<sup>46</sup> Perhaps a biological reality exists that when a man engages in sexual activities with a woman he gives her the right or ability to bear any progeny that they conceive. What he certainly does not grant her, however, is the right to bind him to 18 years of financial obligation to the child or other legal and social parameters of fatherhood. Nevertheless, under the current child support scheme employed by most states in the United States, if a child is born out of wedlock, the child's biological father is required to pay part of his income to the child's mother or a substitute guardian.<sup>47</sup>

However, both men and women are moral agents, and "[j]ust as women are more than wombs, men are more than inseminators" or pocketbooks.<sup>48</sup> Just as with women, men's reproductive rights are derived from their own interests in controlling when and how they become reproducers.<sup>49</sup> Men have parallel interests that must be recognized apart from any generalizations made about their sexuality. Women as sexual beings are subject to all sorts of (often conflicting) stereotypes: they are at once prudish, whorish, selfish, selfless, irresponsible, tricky, righteous, and motherly.<sup>50</sup> Men are also subject to certain societal expectations about

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mother. Minnesota allows only the mother to call for an ambulance as a safe haven. The other 46 statutes refer only to parents or persons, and do not distinguish between the rights of mothers and fathers.

45. Regarding the right to privacy, see DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994); N. E. H. HULL & PETER CHARLES HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* (2d ed. 2010); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy* 4 HARV. L. REV. 193 (1890).

46. See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 897-98 (1992) (holding that a woman did not have to consult her husband before obtaining an abortion).

47. See Christopher Bruno, Note, *A Right To Decide Not To Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008). See also 42 U.S.C. §§ 651-669 (2012); 45 C.F.R. § 302.56.

48. ALEXANDER SANGER, *BEYOND CHOICE: REPRODUCTIVE FREEDOM IN THE 21ST CENTURY* 146 (2004).

49. See generally DE BEAUVOIR, *supra* note 2.

50. See generally, KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA* (1996); DE BEAUVOIR, *supra* note 2; JESSICA VALENTI, *THE PURITY MYTH: HOW AMERICA'S OBSESSION WITH VIRGINITY IS HURTING*

their sexuality that color the current social and legal status quo of their sexual autonomy.<sup>51</sup> Most notably, and for perhaps relevant evolutionary and historical reasons, men as sexual beings are viewed as brutes who must be forced to atone for uncontrolled sexual urges.<sup>52</sup>

The feminist movement in America began as a result of overbearing patriarchal traditions that bound women to lives of lesser autonomy.<sup>53</sup> In this movement, women demanded equality—equal opportunity, equal pay, and a chance to participate and succeed in the public sphere.<sup>54</sup> The first wave of the women's movement that began in the Victorian Era brought women's suffrage; however, it was not before 1949, with Simone de Beauvoir's *The Second Sex*, that the sexual revolution in America accelerated.<sup>55</sup>

Feminism during this time also became associated with various female-centric or power motivated movements, but this was not the essence of feminism.<sup>56</sup> Feminism also did not seek to entrench women's reliance upon men, nor did it seek to relegate men to a lesser status than women themselves might occupy.<sup>57</sup> The feminist movement was not meant to be a shifting of the power imbalance from one camp to the other, but rather a balancing of the rights and autonomy enjoyed by both men and women.<sup>58</sup> The best reconstruction of the many claims advanced in and by feminism sees them as demands for equal respect and consideration of women's moral agency. Put in other words, if feminism is a universal concept, it must be characterized by the idea that women want autonomy and want to be considered equal, grown-up partners in the making and remaking of society.

Rights and privileges of individuals are constantly at odds in an egalitarian society, and these must be balanced against one another.<sup>59</sup> While this may not be simple or convenient—as there often are characteristics

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YOUNG WOMEN (2010); NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (Perennial 2002) (1991).

51. See generally, PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* (2004).

52. *Id.*

53. See generally BARBARA RYAN, *FEMINISM AND THE WOMEN'S MOVEMENT: DYNAMICS OF CHANGE IN SOCIAL MOVEMENT IDEOLOGY AND ACTIVISM* (1992) (exploring the evolution of the feminist movement and its ideas).

54. *Id.*

55. Jo-Ann Pilardi, *Feminists Read The Second Sex in FEMINIST INTERPRETATIONS OF SIMONE DE BEAUVOIR* 29, 39 (1995).

56. See generally, WOLF, *supra* note 49.

57. See, e.g., CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* (2003) (arguing that feminism must be a universal claim).

58. See generally DE BEAUVOIR, *supra* note 2.

59. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Vlad Perju, *Proportionality and Freedom—An Essay on Method in Constitutional Law*, 1 GLOBAL CONSTITUTIONALISM 334 (2012) (explaining the success and appeal of proportionality in a society of conflicting interests).

that make certain individuals more vulnerable than others, which must be accounted for in this ‘leveling’—the swings and shifts of the feminist movement have left an unmistakable mark in the architecture of American public policy surrounding reproductive choice.<sup>60</sup>

In certain periods of human history, mere physicality and brute strength have proven to be considerable assets in the protection of offspring.<sup>61</sup> In the more modern day, it has been assumed that because male earning power was so much higher than women's earning power, a man was necessary in the financial mix for raising the child properly.<sup>62</sup> Likewise, rape, sexual violence, and even seduction or pursuit of a female mate ending in sex of the consensual variety are deeds that have been characterized as an outcome of men's more animalistic nature.<sup>63</sup> It is no surprise that contemporary public policy favors such antiquated notions of male and female sexuality; however, the day has changed. At least in the United States, the call for equality is finally coming around. Things are not perfect, and we certainly point with outrage at the situations in which women still receive less pay for equal work.<sup>64</sup> But the bottom line, however, is that more women attend college than men, and the wage gap has drastically closed.<sup>65</sup> Thus, while the “women’s rights” movement has not fulfilled all of its goals, it has brought women very far. In pushing further towards equality, I argue that women must look to the assertion of true

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60. See REBECCA KLUCHIN, *FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980* (Rutgers Univ. Press 2011) (2009) (noting that the feminist movement has facilitated changes in reproductive policy including access to health care for women and eliminating outdated sterilization policies). See also WENDY KLINE, *BODIES OF KNOWLEDGE: SEXUALITY, REPRODUCTION, AND WOMEN'S HEALTH IN THE SECOND WAVE* (2010); JOHANNA SCHOEN, *CHOICE AND COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE* (2005); JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* (1999).

61. See, e.g., EDWARD O. WILSON, *ON HUMAN NATURE* (2004).

62. See Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Going, Going . . . but not Gone*, in *THE DECLINING SIGNIFICANCE OF GENDER?* 37, 38 (Francine D. Blau et al. eds., 2006).

63. See ESTELLE B. FREEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE, AND SEGREGATION*, 95 (2013) (Discussing how rape and rapists were characterized). See also, Panel Discussion, *Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 126-28 (1994). See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

64. Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence* 60 *INDUS. & LAB. REL. REV.* 45 (2006); Donna Bobbitt-Zeher, *The Gender Income Gap and the Role of Education*, 80 *SOC. OF EDUC.* 1 (2007). Discrimination in the workplace should be eradicated in all forms. Furthermore, people should concentrate on implementing policies that truly support families by enabling them to both raise their children and to participate to a higher degree in the workplace—for example: paid maternity and paternity leave, access to high quality childcare, flexible work hours, etc. If women and men are given real options in creating a customized work-life balance, it may even turn out that some individuals decide that trading lower pay and lower prestige for a more flexible schedule is worthwhile. However, it should not be overlooked that women are making and have made great strides; women, in general, are perfectly capable of supporting themselves without a man in their lives.

65. Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, *N.Y. TIMES* (July 9, 2006) [www.nytimes.com/2006/07/09/education/09college.html?pagewanted=all](http://www.nytimes.com/2006/07/09/education/09college.html?pagewanted=all) (showing that only 42% of college students are men).

autonomy and withdraw from any further abrogation of their own moral agency.<sup>66</sup>

# I. REPRODUCTIVE AUTONOMY IN THE U.S. SUPREME COURT

While a woman's right to choose may indeed be incomplete,<sup>67</sup> a man's "right to choose" is rarely even addressed in the courts. Even so, it is helpful to look to the legal principles framing our current understanding of reproductive choice. *Roe v. Wade*<sup>68</sup> declared unconstitutional a state statute that prohibited a woman from legally obtaining an abortion.<sup>69</sup> In *Roe*, the Supreme Court justified the right to abortion as an effect of the right to privacy and due process under the Fourteenth Amendment of the United States Constitution.<sup>70</sup> This right is then balanced against what the Court sees as the state's main interests in the matter—the protection of fetal life and the protection of women's health.<sup>71</sup> There is also a psychological and material element of parenthood, which the Court deems relevant to the issue of privacy and "choice."<sup>72</sup> Consider the liberty and privacy interests language used by the Court:

[Criminal abortion laws] improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras.<sup>73</sup>

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66. A similar point is made by Jeannie Suk regarding the inclusion of language regarding 'abortion trauma' in Supreme Court decisions. See generally, Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

67. Not only are there constant legal and social attacks against the abortion right, but the basic framework of the right itself is flawed. As Twiss Butler noted, "In *Roe v. Wade*, a way was found to legalize abortion without acknowledging women's right to autonomy at any stage of pregnancy decision-making, including the initiation of the pregnancy itself." Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?* 4 YALE J.L. & FEMINISM 133, 139 (1991).

68. 410 U.S. 113 (1973).

69. *Id.*

70. *Id.*

71. The detriment that the State would impose upon the pregnant woman by denying this choice (of abortion) altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

72. *Roe*, 410 U.S. at 128.

73. *Id.* at 129.



Forty years after the landmark Supreme Court decision of *Roe v. Wade*, a woman's right to reproductive autonomy is still fair game for political jockeying and compromise. In many states a woman faces greatly fettered access to abortion services,<sup>74</sup> and it is not unheard of for a woman to be refused even birth control due to the cited religious belief of a pharmacist.<sup>75</sup> Feminist rhetoric is important in further entrenching this entrenched right; however, the duality of such a right must not be ignored. After four decades of the *Roe* decision and innumerable challenges to it at the legislative, executive, and judicial spheres, it is safe to say that in American jurisprudence, there is a strong tradition in preserving the woman's essential right to choice—the right for a woman to actually have an abortion, even when the exercise of the right is conditioned upon certain onerous requirements before the procedure. That said, no such privilege relating to the momentous choice of parenting is available to men.

The root of procreative autonomy can be found in *Skinner v. Oklahoma ex rel Williamson*,<sup>76</sup> where the Supreme Court declared that it was unconstitutional for states to sterilize criminals in order to prevent future criminal sorts.<sup>77</sup> The statute was struck down on equal protection grounds, with the idea that it “deprive[d] certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”<sup>78</sup> *Skinner*, therefore, establishes that the right to procreate is a protected right. The second part of reproductive choice, the right not to procreate, was first affirmed in *Griswold v. Connecticut*,<sup>79</sup> where the Supreme Court invalidated a state law that prohibited the dissemination or use of contraception.<sup>80</sup> *Roe v. Wade* further extended the right “not to procreate” to include the right to terminate a pregnancy through the means of legal abortion.<sup>81</sup> In *Planned Parenthood of Se. Penn. v. Casey*,<sup>82</sup> the Supreme Court further restated the scope of a woman's right to terminate a pregnancy along with the reasoning behind it,<sup>83</sup> The state could not force a woman to give birth because of the imposition on the woman's body and her future prospects from that moment onward. In essence, the state could not choose for the woman because it could not grasp what was the correct

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74. See, e.g., ARK. CODE ANN. § 20-16-1305 (2013) (restricting abortions to births that are prior to twenty weeks post-fertilization); S.D. CODIFIED LAWS §34-23a-56 (2013) (requiring a seventy-two hour waiting period between consultation and procedure).

75. E.g., ARK. CODE ANN. § 20-16-304 (2013); GA. CODE ANN. § 49-7-6 (2013); MISS. CODE ANN. § 41-107-5 (2013).

76. 316 U.S. 535 (1942).

77. *Id.* at 541.

78. *Id.* at 536.

79. 381 U.S. 479 (1965).

80. See *Griswold*, 381 U.S. at 485-86; Bruno, *supra* note 46, at 145-47.

81. *Roe v. Wade*, 410 U.S. 113, 162-64 (1973).

82. 505 U.S. 833 (1992).

83. See *id.* at 846-853.

mode of action for that woman, in particular. Though the state had an interest in protecting fetal life, that the woman could choose whether or not she was willing, able, and ready to become a parent was still of vital importance:

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>84</sup>

In essence, the court in *Casey* rejected the idea that biology is destiny and placed a woman's decision to bear (or not to bear) a child in her own hands as opposed to the hands of society at large.<sup>85</sup> Of course, this decision was made under the equality component of the Fourteenth Amendment to the U.S. Constitution, and as such, the court did not have to consider that there were in fact no physically pregnant men.<sup>86</sup> Having done this, the court could conclude that the right to choose was a woman's liberty and that infringement upon that liberty would take place if the decision were not given to the pregnant woman alone.<sup>87</sup>

In reaffirming *Roe*, the *Casey* Court made the most of the "liberty interest" of reproductive choice.<sup>88</sup> In doing so, it also negated the notion of an absolute privacy right not to parent.<sup>89</sup> The pregnant woman was still within the reach of the state because there were multiple interests involved.<sup>90</sup> For example, the state provisions limiting the right to abortion, such as the twenty-four-hour waiting period or the so-called partial-birth abortion ban, were decidedly lawful because, while they may have fettered access to abortion, they did not in and of themselves interfere with a woman's autonomous decision-making ability.<sup>91</sup> Furthermore, the right to an abortion understood in *Roe* is not, in actuality, a positive right. The Constitution does not guarantee access to abortion; it only affirms the right to elect to have an abortion.<sup>92</sup> Many state-sponsored medical care pro-

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84. *Id.* at 852.

85. *Id.* at 851.

86. *Contra* *Geduldig v. Aiello*, 417 U.S. 484 (1974) (considering an equal protection challenge to California's disability insurance program that exempted pregnancy, in which Plaintiff argued that the program invidiously discriminated against women, given the fact that only women can become pregnant) *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-554, 92 Stat. 2076.

87. RUTH COLKER, *PREGNANT MEN: PRACTICE, THEORY, AND THE LAW*, 95-96 (1994).

88. *See* *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 853 (1992).

89. *Id.* at 871.

90. *Id.* at 867-78.

91. *See* Bruno, *supra* note 46, at 147.

92. *See* *Roe v. Wade*, 410 U.S. 113, 165-66 (1973).

grams do not pay for abortions, while most of them do pay for pre-natal care and birth and delivery eventualities.<sup>93</sup> In fact, many states that participate in Medicare and Medicaid do not sponsor even medically necessary abortions if federal law does not reimburse them.<sup>94</sup> Therefore, the constitutional issue must be the protection of the decision-making aspects of *Roe*.<sup>95</sup>

Given the liberty interests granted to women, there is an equal protection argument to be made on behalf of biological fathers who do not wish to parent, though such claims have not proven successful as of yet. In *Dubay v. Wells*,<sup>96</sup> such an equal protection case was brought by a man regarding the legal compulsion requiring him to pay child support for a child that he did not want and never intended to have.<sup>97</sup> The district court dismissed the case for “failure to state a claim upon which relief could be granted,” and the 6th Circuit affirmed.<sup>98</sup> However, there are a number of obvious constitutional shortcomings in current public policy with regard to men.<sup>99</sup> As women’s reproductive choice must be balanced against legitimate state interests, so must those of the man’s reproductive choice:

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93. See *Can Medicaid Cover My Abortion*, FUND ABORTION NOW, [www.fundabortionnow.org/get.help/medicaid](http://www.fundabortionnow.org/get.help/medicaid) (last visited Oct. 7, 2013); MEDICAID.GOV, [www.medicaid.gov/Medicaid-Chip-Program-Information/By-Population/Pregnant-Woman/Pregnant.Woman.html](http://www.medicaid.gov/Medicaid-Chip-Program-Information/By-Population/Pregnant-Woman/Pregnant.Woman.html) (last visited Oct. 7, 2013).

94. See *State Funding of Abortions Under Medicaid*, THE HENRY J. KAISER FAM. FOUND., <http://www.statehealthfacts.org/comparetable.jsp?cat=10&ind=458> (last visited October 23, 2012).

95. Bruno, *supra* note 46, at 147.

96. 506 F.3d 422 (6th Cir. 2007).

97. *Id.*

98. *Id.* at 431 (quoting FED. R. CIV. P. 12(b)(6)). The court goes on to say that while it is true that “equal protection under the laws” is paramount to our understanding of justice, the law does not deny the power to treat differently situated classes of persons in different ways. *Id.* at 429-30. The 6th circuit then completes an equal protection analysis, which, because it involves gender, must show that there is an “exceedingly persuasive” government purpose in order to rebut the statute (which is presumed valid). *Id.* at 429 (quoting U.S. v. Virginia, 518 U.S. 515 (1996)). The court also discusses strict scrutiny, which would be used if a fundamental right were at hand. *Id.* The court rejects all mode of analysis because, it claims, there is not a fundamental right at hand—only child support laws are involved—and because the case *N.E. v. Hedges*, 391 F.3d 832 (6th Cir. 2004) establishes a privacy right does not establish the right to reject parenthood after a child’s birth. The discussion in *Dubay*, I think, wrongly relies on the *N.E. v. Hedges* precedent, because in the facts of *Dubay* it is clear that the father of the child in question did not consent to become a father. *Dubay*, 506 F.3d at 426. In fact, he was assured by the child’s mother that she was unable to have children at the time in question. *Id.* Furthermore, a fundamental right (life, liberty, etc.) is at hand, and the facts of the case almost certainly do not lend themselves to overcome a strict scrutiny analysis. *N.E. v. Hedges* is a 6th Circuit precedent that, with similar reasoning, decides a man should pay child support even after the woman who had his biological child claimed to be unable to become pregnant before having sex with him. *Hedges*, 391 F.3d at 836. Upon becoming pregnant, she left the state and married another man, and then sought child support payments after several years. *Id.* at 832 Both cases reward deceit and discount the liberty interests of the male. Furthermore, neither case contends that biological father has any substantive due process claim, though I find it hard to believe that he doesn’t under such circumstances.

99. The fact that courts have refused to consider the equal protection claim should not be taken necessarily as proof that there is not one, only that a prejudice exists. Similarly, the lack of public policy addressing the issue is telling.

The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.<sup>100</sup>

Thus, it may be granted that as with women, the right of men to procreate when and how he chooses is not absolute. However, this does not negate a full and thorough consideration of such a right.

## II. BIOLOGICAL AND OTHER REALITIES

This essence of equality in the reproductive process is not changed by the biological realities of parenthood, as is often argued.<sup>101</sup> The Supreme Court has rightfully concluded that a mother's right to be a biological parent according to her interest in her own bodily integrity is not outweighed by the father's right to either be or not to be a biological parent.<sup>102</sup> A man has no business dictating whether a woman has an abortion—even if he is the biological father of the fetus.<sup>103</sup> To grant this “right” would indeed be a most egregious affront to the commonly understood definition of person, privacy, or liberty.<sup>104</sup> Therefore, a male who has fathered a fetus should not be given the choice as to whether the fetus should be carried to term or aborted. As an essential fact of biology, he gave up this choice when he voluntarily engaged in sexual acts with his female partner. However, this does not negate his ability to maintain reproductive autonomy. Though he cannot choose whether or not a biologically-related fetus will be carried to term, the man should have the choice whether to actually be a parent (in the legal and social senses), even when he cannot decide whether he will become a biological parent. It may even be true that the fact of biological parenthood may prove very persuasive in a man's decision-making process, but this process of choice should not be disallowed.

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100. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

101. *See, e.g., Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979).

102. *See Danforth v. Planned Parenthood of Cent. Mo.* 428 U.S. 52, 69 (1976) (“[T]he State may not constitutionally require the consent of the spouse . . . as a condition for abortion.”). *See also Bruno, supra* note 46, at 150.

103. *See Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 894 (1992) (striking down a provision that required women to gain legal consent from their husband before attaining an abortion); *Danforth*, 428 U.S. at 69.

104. For explanations on the importance and intricacies of the right to privacy with regard to reproductive rights, see *GARROW, supra* note 44; *HULL & HOFFER, supra* note 44; *Warren & Brandeis, supra* note 44.

That this “decision” to become a parent should happen in a moment of sexual passion is untenable. During the sexual revolution, it was argued that for women to fully participate in the public sphere, it was necessary to be able to control their own reproduction.<sup>105</sup> Birth control, safe abortion, etc., unsettled women from the bonds of motherhood and allowed them to go forth into the world so that they might be on equal footing with men.<sup>106</sup> In this process, it was only assumed by the most conservatively motivated theorists that women should control their own reproduction through abstinence.<sup>107</sup> Sex between individuals is a fact of life—a celebrated, healthy, positive fact of life. It is just as certain that a number of accidental pregnancies will result from this fact of life.<sup>108</sup> Responsibility, as it were, in reproductive decision-making is of the utmost importance; however, “responsibility” cannot only mean what happens in the seconds before sexual intercourse.<sup>109</sup> Women are not forced to become parents after failing to exercise proper birth control (or perhaps for an accidental failure of birth control), as men should not be. It should not be in this frenzied moment of sexual excitement that choice is made. Rather there should be room for choice even after conception. As the language in the *Casey* decision states:

Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe’s* holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be *de minimis*. This argument would be premised on the hypothesis that reproductive planning

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105. See CONTROLLING REPRODUCTION: AN AMERICAN HISTORY (Andrea Tone ed., 1997) [hereinafter CONTROLLING REPRODUCTION] (exploring the role that reproductive control has played in advancing women’s rights through historical analysis). See also DE BEAUVOIR, *supra* note 2; BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (Norton 2001) (1963); PAT GROGAN, *ABORTION IS A WOMAN’S RIGHT* (1985); RUTH DIXON-MUELLER, *POPULATION POLICY AND WOMEN’S RIGHTS: TRANSFORMING REPRODUCTIVE CHOICE* (1993); MICHELLE MURPHY, *SEIZING THE MEANS OF REPRODUCTION: ENTANGLEMENTS OF FEMINISM, HEALTH, AND TECHNOSCIENCE* (2012); MARGARET SANGER, *FAMILY LIMITATION* (1924).

106. See Harold P. Southerland, “Love for Sale”—*Sex and the Second American Revolution*, 15 DUKE J. GENDER L. & POL’Y 49, 54 (2008) (“In giving women control over their reproductive function, the pill made possible . . . access to life activities on an equal footing with men.”).

107. See, e.g., *Abstinence education : hearings before a subcommittee of the Committee on Appropriations, United States Senate, One Hundred Fourth Congress, second session, special hearings, July 11, 1996—Washington, DC, July 22, 1996—Pittsburgh, PA, July 29, 1996—Landisville, PA, July 29, 1996—Scranton, PA* (1997).

108. For the rate of unintended pregnancies by state, see Lawrence B. Finer & Kathryn Kost, *Unintended Pregnancy Rates at the State Level*, 43 PERSP. ON SEXUAL & REPROD. HEALTH 78, 81 (2011).

109. Notable also is a lack of pre-emptive form of birth control for men, such as is available to women in the form of the birth control pill. Thus, men have arguably less control over conception than women.

could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.<sup>110</sup>

Women, having also engaged in what could be described as a “moment of passion,” are given far longer to decide whether they will or will not parent the fetus.<sup>111</sup> It is a biological reality that the child must incubate within them and not the father, but the essence of abortion (to abort or not to abort?) is reproductive choice. It is not for reasons of physical autonomy that women choose to bear or not bear a fetus to term, it is for reasons related to reproductive autonomy. For example, it is surely only a small percentage of women who choose to have an abortion because of the effect of the fetus on her body. This is because it is only when the fetus becomes *unwanted* that it becomes a burden to her body. Whatever the consideration, a woman is allowed to not only engage in un-protected sex that results in the conception of a perhaps unwanted child without punishment, but she is also allowed to weigh her own, personal, selfish, reasons against having or not having the child. She is given a chance to reject biological motherhood—but this is a mere accident of the inescapable biology of reproduction. In having the choice to elect abortion or not, the mother is also given the choice to become or not to become the social and legal parent. Additionally, in order that she adequately consider whatever personal reasons she may care to consider, she is given at least until fetal viability to decide on the matter. According to the Supreme Court in *Casey*:

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concern-

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110. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 856 (1992).

111. Roe v. Wade, 410 U.S. 113, 163-64 (1973) (stating that, from conception to the end of the First Trimester, the reproductive decision rests with the woman and her doctor).



ing not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.<sup>112</sup>

Most importantly, *Roe* and *Casey* establish for women that their liberty interest in having the ability to choose motherhood is significant.<sup>113</sup> Men's rights in parenthood (at least the legal and social types), therefore, must be analogous. Because there are interests at odds (those between the mother/father/child/state), when biological parents disagree about parenting decisions, there will necessarily be impositions upon one or all of those entities. Though it may seem most fair by some views to require a male to look after any biological offspring he fathers, this has not been the course of the liberty guarantees of the due process clause. The Due Process Clause of the Fourteenth Amendment requires that individuals not be deprived of certain liberties, no matter what the imposition to the state or to other individuals.<sup>114</sup> In *Planned Parenthood of Central Missouri v. Danforth*, the court affirmed the idea that a woman may not be compelled to have an abortion.<sup>115</sup> The court resolves that not even in the cases that a pregnant woman is married may the male reproductive partner enjoin her from having an abortion.<sup>116</sup> The court held that the state may not "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy."<sup>117</sup> Thus, a woman is granted certain privileges because of her unique stake as a pregnant woman, allowing her choosing whether or not to become a parent. Because she is physically pregnant, it is a compelling societal

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112. *Casey*, 505 U.S. at 852-53.

113. *See id.* at 853.

114. *See Roe*, 410 U.S. at 155.

115. *Cf. Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69-71 (1976) (holding that, even if she is married, the woman is the sole arbiter of whether or not to carry her pregnancy to term).

116. *Id.*

117. *Id.* (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975) (Webster, J., concurring in part & dissenting in part)).

value to allow her to choose to birth or not, even when a man's wishes or interests are impinged.<sup>118</sup>

Contrast the reproductive autonomy of men. Men, as it were, are supposedly only given a choice at the moment of copulation. However, even when they have no relationship (barring the necessary sexual one) with the mother, they are thereafter responsible for any child that may result.<sup>119</sup> Notably, it does not matter whether the female was lying about her birth control status, whether the condom malfunctioned, or whether the male was under the impression that the female would abort any resulting fetus.<sup>120</sup> Thus, men that are sexually active must be at all times prepared for fatherhood. Women, on the other hand, may at all times choose whether or not they become mothers. There is a clear disparity in responsibility levels. Under state-mandated fatherhood, every male who chooses to be sexually active also chooses to become a father if a pregnancy results. It is untenable, and constitutionally frowned upon, to restrict sexual freedom (i.e., personal decision-making processes that lead a person to have sex or not).<sup>121</sup> However, in this case it is as if the state gives men a choice between engaging in sexual activity, and perhaps becoming fathers, or not engaging in sexual activity. This view is exactly what women, and the women's liberation movement, has been fighting against—having to make a choice between sexual freedom and social ability. Why, then, should our male counterparts be forced into parenthood while women have for so long lobbied against forced parenthood?

### III. WOMEN AND MEN'S CHOICES

Can it be said that compulsory fatherhood exists in order to further support women who choose to give birth? If we consider that each human being as an independent moral agent, then they each must have access to their own decision-making capabilities without force or compulsion to reliance on others. If there is a conflict between those decision-making capabilities and one must cede decision-making power to the other, then

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118. *See id.*

119. *See, e.g.,* E.E. v. O.M.G.R., 20 A.3d 1171 (N.J. Super. Ct. Ch. Div. 2011) (holding that a "sperm donor" could not relinquish his parental rights, despite an agreement with the biological mother to do so).

120. *See, e.g.,* Dubay v. Wells, 506 F.3d 422 (6th Cir. 2007) (holding that biological father could not relinquish his parent rights, despite being misled about the biological mother's ability to conceive.); *See also* Bruno, *supra* note 46, at 167 ("[A] male cannot simply argue that he inferred that pregnancy was impossible or that, if he and his partner had discussed the issue, the mother would have agreed to abort the fetus.").

121. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state law prohibiting usage of contraceptives as an unconstitutional invasion of privacy); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992).

there must be equitability within that, especially when the state is involved. In the case of abortion, where the woman is given fully the decision whether or not to give birth, there are certain things that the male has already ceded to her. That is, when the male has completed a mutually agreed upon sexual act with a female, he has no ability to say whether or not she carries any resulting biological fetus to term. That she has this decision, to carry the fetus or not, should not necessarily affect the rest of his entire life if he does not wish for it to. Likewise, the man cannot influence her decision-making process in requiring abortion because of the distinct biological realities of reproduction. For example, pregnancy is an affront to the woman's body, a physical imposition that requires certain things of the pregnant female as an effect of her unique station as a woman in the biological process. However, this physical imposition is a very short-lived one, and should not lead to a conclusion that women are the only ones given choices in the matter. Considering both the man and woman as independent moral agents, the woman must make the decision whether or not to have the child on her own. This decision should not be subsidized by a government compulsion of men to pay child support against their will. Women who are pregnant with fetuses whom the biological father did not desire must decide on their own to birth and raise the child, and not rely on the state guaranteed idea that there will be another parent made available to assist them. The state cannot compel women to become parents, but in choosing to have a child alone—without the desire of the biological father—the woman must be willing to take on the full brunt of her decision. That the state compels men to become fathers, does, in effect, deprive women of their full moral agency in this circumstance.

Taking the broad view, reproductive rights developed out of the conflict between men and women in the realm of reproduction.<sup>122</sup> Women who were able to control their own reproduction were better able to ensure survival of their young and themselves.<sup>123</sup> In addition, the most effective reproductive strategy was to have around a strong, able-bodied male to help raise and provide for the children.<sup>124</sup> On the other hand, the most successful reproductive strategy for men was to mate with and, perhaps, impregnate as many women as possible as a means of ensuring his own genetic material was passed down through the generations.<sup>125</sup> Thus, one can see the ages-old conflict. What was instinct in our earliest female ancestors (to control their own reproduction in order to help ensure survival)

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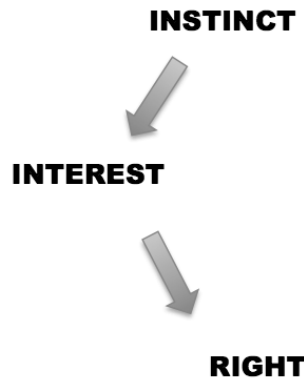
122. See Linda Gordon, *The Struggle for Reproductive Freedom*, in CONTROLLING REPRODUCTION, *supra* note 104, at 147 (arguing that the “struggle for birth control” broadly represented a challenge to the subordination of women sexually and socially).

123. See, e.g., WILSON, *supra* note 60

124. WILSON, *supra* note 60 at 128

125. WILSON, *supra* note 60 at 133.

became interests as society began to organize.<sup>126</sup> In the modern day, we have seen those interests become rights in the form of legally protected liberty interests, human rights, and the like.<sup>127</sup> These rights are often closely associated with “freedom” and “democracy” and the various other fruits of a liberalized society.<sup>128</sup> One such right that women worked very hard to make a reality in organized society was the right of choice.<sup>129</sup> Nowadays, most women feel quite comfortable in the idea that their reproductive autonomy is something that is inviolable.



To further illustrate, women, in arguing for the right to control their own reproductive destinies, have primarily argued for “choice.”<sup>130</sup> This choice is supposed to liberate women from patriarchal systems—in effect, this “choice” must free women from any male imposition on their reproductive autonomy. Women must choose to become mothers because they want to become mothers (and sole caretakers) if and when the male responsible for her impregnation does not choose to become a father. For women to make a truly independent decision, the woman must not be able to rely on the assumption that there will be a man to help her. If two people freely decide to raise a child together, then the mother may depend on that decision freely made. However, if the biological father decides that he does not wish to raise the child, she may not depend on support from the father. That the state mandates such support from biological fathers, including those who expressly choose to remain free of parental responsibilities, means that the state is abrogating women’s decision-making ability. A woman cannot understand or decide for herself if she wants to become a single parent when she at all times assumes that the state will com-

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126. WILSON, *supra* note 60 at 133

127. See, e.g., WILSON, *supra* note 60

128. WILSON, *supra* note 60 at 133

129. WILSON, *supra* note 60 at 136-7

130. See, e.g., MARLENE GERBER FRIED, FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT (1999). See also, WILSON, *supra* note 60 at 147 (through laws, society emphasizes various choices that correspond to their value systems).

pel the biological father to parent as well. Furthermore, in order to promote gender equality, men must be willing to take on their own share of childcare responsibilities.<sup>131</sup> How can they be asked to do so when they are compelled to parent through interests that are not their own?

Competing interests must be balanced in order to find the most compelling notion of “fairness.” Even considering this, the Due Process Clause “has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”<sup>132</sup> As such, because reproductive autonomy is considered by the Supreme Court to be so compelling in so many cases, the reasons used to coerce men to become fathers must be carefully re-evaluated. Even if it is for reasons of “fairness” towards women that men are compelled to parent, this is not an adequate justification for a failure to honor reproductive autonomy in men.<sup>133</sup>

Instead, there must be a balance struck between the needs of women, men, children and the state in this circumstance; however, this balance must take to heart the importance of the ability to determine one’s reproductive future. As with women, men do not necessarily make the decision to become parents at the moment of coitus, and they should not be compelled to parent by the state because they engaged in sexual acts, either. In *Casey*, the court says that “[t]he best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”<sup>134</sup>

Liberty demands that men be given the analogous right to choose to become parents. It is men, too, who must be liberated by society and the law from their own biology. In a time when women possess an impressive control over their ability to decide when to procreate, there is a call for the scales to be re-balanced. It was once true that women could not adequately control their own reproduction.<sup>135</sup> The fact that men were an inte-

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131. See Heidi Hartmann, Stephen J. Rose, & Vicki Lovell, *How Much Progress in Closing the Long-Term Earnings Gap?* in *THE DECLINING SIGNIFICANCE OF GENDER?*, *supra* note 62, at 149 (“What can be done to advance women’s progress toward equality? In both increasing their educational preparation and their labor-force participation, women as individuals have made enormous changes in their lives. Further progress will require that men, employers, institutions, and governments change. . . . Encouraging men to take on their fair share of family-care responsibilities would also have positive effects on women’s long-term earnings.”).

132. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 846 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

133. Indeed, “fairness” seems to be at the center of the debate. In *Dubay*, it was argued that it was unfair for men to have no choices where women had many, even when they were told that a pregnancy was an impossibility. *Dubay v. Wells*, 506 F.3d 428, 429 (6th Cir. 2007). Likewise, women might argue that it is unfair for them to have to raise children all by themselves.

134. *Casey*, 505 U.S. at 850 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

135. See, e.g., *ON HUMAN NATURE*, *supra* note 60. See also, *CONTROLLING REPRODUCTION*, *supra* note 104.

gral part in reproduction—which could not be adequately controlled—was balanced in that it required men to bear the same responsibility as women.<sup>136</sup> It corresponded neatly that because women could not in fact control their own reproduction, and because reproduction took such a toll on their ability to become economically functional members of society, men should be compelled to answer for this helplessness and to subsidize the birth of their own children whether or not they intended to father them.<sup>137</sup> But we are no longer brutes. Women have come very far in the world in both controlling how and when they procreate and being able to support themselves without the aid of a man. We must now come to terms with women's equality and push it further. Women's liberation is about equality with men, not a shift in domination—women should not demand heightened responsibility of men while shirking it themselves.

In essence, a woman has the right to choose when and how she engages in sexual acts and whether or not she practices safe sex. A woman has the right to choose whether she will give birth or raise any fetus resulting from unprotected or under-protected sex. However, in making the decision whether to parent, the woman does not have the right to rely on male involvement if the male does not choose to become involved as a social or legal father figure. If the biological father is compelled to parent offspring that he does not wish to parent, due to state coercion his rights of reproductive autonomy are violated because his right to choose is made unavailable. In addition, if the state uses its coercive mechanisms to compel legal and social fatherhood, it is, in reality, forcing a wedge between the woman and at least a portion of her own moral agency.

#### IV. THE RIGHTS OF FETUSES AND CHILDREN

It cannot be assumed that fatherless children will exist in some sort of societal vacuum. Under a rubric of paternal choice and freedom to procreate, there will be born children of wealth and children of dire poverty. Where there is an issue of lack of material support, some assume that the child would be better off were a biological father to step into the role of provider and fill the outstanding need.<sup>138</sup> This is an analysis that does indeed balance compelling state interests.<sup>139</sup> However, to answer this you must consider what a child is ENTITLED to as far as parental financial ability. If a child is entitled to a certain level of care (food, shelter, edu-

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136. JOAN C. CALLAHAN, *REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES*, at 130 (1996).

137. See generally, MARTHA OZAWA, *WOMEN'S LIFE CYCLE AND ECONOMIC INSECURITY* (1989).

138. *Id.*

139. See, for example, [https://www.oag.state.tx.us/ag\\_publications/txts/paternity.shtml](https://www.oag.state.tx.us/ag_publications/txts/paternity.shtml) (Showing a clear state interest—present or future absolution from the state itself paying benefits—in the child obtaining support from the biological father).



cation, etc.), then children must have access to a certain level of financial ability exercised on their behalf. However, the state does not require an income test for prospective parents,<sup>140</sup> as to do so seems immediately violative of a closely held constitutional belief in freedom of reproduction (such an income test would be almost analogous to sterilization or an actual injunction on parenting).<sup>141</sup> Instead, this floor level of financial ability for children is guaranteed by the state if the parents are unable to meet it.<sup>142</sup> If this means that the childless must subsidize those raising children on a societal level, then so be it. Parents do a veritable service to society in raising the next generation and to deny support to them would almost certainly prove detrimental.

There are four basic scenarios that might apply to a fetus in the realm of parental choice:

1. The biological mother and father both choose to parent the child (birth)
2. The biological mother and father both choose not to parent the child. (abortion or adoption)
3. The biological father chooses to parent the child, the biological mother does not (abortion or adoption)
4. The biological mother chooses to parent the child, the biological father does not (birth)

The fact of abortion and the possibility of impending parenthood only becomes an issue when the fetus is unwanted by one parent. If both parents want the child, then there is no conflict of choice interest between the mother and father. It is the same if the fetus is not wanted by both parents—as long as there exists enough extra income to pay for an abortion between the two, then adequate access to safe abortion is likely enough.<sup>143</sup> When the biological mother wants to birth the child and the father does not, there is a conflict. This is also true when the father wants to parent the child and the mother does not want to go through the birthing process; however, in this case, women are given more leeway because of the physical imposition of pregnancy and birth, which no other individual or entity can rightfully be given control of.

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140. "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)

141. Gayle Binion, *Reproductive Freedom and the Constitution: The Limits on Choice*, *Berkeley Journal of Law, Gender, and Justice* (2013) at 24 (stating there is virtually no constitutional/legal restriction on the ability to have children).

142. *Supra* note 137.

143. Granted, the waiting periods and other bogus impositions justified by the so-called state interest in preserving fetal life do a good bit of disservice to poor and rural women. I will not discount the difficulties involved in finding adequate abortion services in many areas of the country.

A child need not be born with a father in order for his needs to be met. If a child is born with a father who chose to parent that child, then that is fine. But it may be the case that the child's biological father did not wish to become his father socially or legally, and in this case he will only have a mother when or until another individual chooses to become his parent. If this sounds cruel, it is certainly no crueler than a mother giving a child up for adoption or aborting a fetus.

A child may be born to a woman with a sperm donor, and the genetic donor is not required to become the legal or social father to the child.<sup>144</sup> Most rational minds would not say that these children are necessarily at any severe disadvantage as a result.<sup>145</sup> The needs of the child will be met by the mother alone or by the mother with the help of the state. This has been rationalized by the courts as being an effect of contract: the mother had a contract with the genetic donor that he would only be the genetic donor and nothing more.<sup>146</sup> In the case of a sperm donor, the state is making clear that women can contract away their social and legal claims against their child's biological father, recognizing that women have the capacity, understanding, and ability to know what is at stake in becoming a mother.<sup>147</sup> The only difference between conception through sperm donation and conception through donation by a father unwilling to parent is the sexual act.<sup>148</sup> It cannot be so that only if a woman chooses a sperm donor may she fully be aware of her decision to become a sole parent. Or, rather, it cannot be that only in the case of sperm donation will the state recognize that a child can be without a father.<sup>149</sup>

## V. MEN AND MYTHS

Even into the modern day, women are more often expected to be the main childcare providers, whether due to personal choice, familial expect-

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144. See *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007).

145. Indeed, many characterize such children as "extra wanted" because of the additional challenges that the parent had to endure in order to have them. See, e.g., DAVID M. BRODZINSKY AND MARSHALL D. SCHECHTER, *THE PSYCHOLOGY OF ADOPTION* at 79 (1993).

146. See, e.g., *Ferguson*, 940 A.2d at 1248; *Lamaritata v. Lucas*, 823 So. 2d 316, 319 (Fla. Dist. Ct. App. 2002).

147. See, e.g., *Ferguson*, 940 A.2d 1236; *Lamaritata*, 823 So.2d 316;

148. See *E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. Ct. Ch. Div. 2011) (deciding that a sperm donor could not be treated legally as a sperm donor because he provided his genetic material directly to the mother and did not use a physician's services).

149. Compare *Ferguson*, 940 A.2d 1236 (refusing to require a sperm donor to pay child support even when the sperm donor was known to the mother) with *Ex rel H.C.S.*, 219 S.W.3d 33 (Tex. App. 2006) (refusing on standing grounds to allow a man who had fathered a child through artificial means to establish himself as the legal father of the child even where he knew the mother); *Steven S. v Deborah D.*, 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005) (refusing to allow a man who conceived a child through artificial means legal recognition as a father even when he had a relationship with the child and a sexual relationship with the mother) and *Lamaritata*, 823 So. 2d 316 (concluding that a sperm donor was not a father and had no parental rights as such).

tations, or other socio-economic factors, and they must undertake a higher physical burden in the pursuit of biological parenthood.<sup>150</sup> It makes much sense that women should be given a choice as to whether or not to become a parent. However, fathers are also subjected to a high bar of responsibility while being given no corresponding choice. That women are granted the choice physically to bear a child reflects biological realities as well as existing cultural practices that place the burden of child-raising more squarely on women's shoulders. However, this reproductive policy is an incomplete reaction to the question of reproduction seen in the context of equal moral agency.

Child support from men who affirmatively choose to parent, but who are not or cease to be the primary caregiver for a child, may indeed be justifiable as a result of an existing responsibility to that child. However, compelling a man to parent an unwanted child that a woman has affirmatively chosen to give birth to is incongruous.

Men who choose not to become parents or not to support unwanted children are thought of as deadbeat dads,<sup>151</sup> or simply as cruel. Perhaps even more telling, the picture of the woman who gives her biological child up for adoption is lauded—she has chosen to birth a child and chosen to “give the child a better life,” as is often the rhetoric.<sup>152</sup> There is no objective reason why a male choosing not to parent should have any more severe social consequences than a woman choosing not to parent. Perhaps society says that if a father knows his biological child exists somewhere in the world, he should desire to ensure the child's welfare. But this fable is based on a certain idea of morality and is not necessarily what should be reflected in a legal code that values the privacy right and reproductive autonomy.<sup>153</sup> Legal values do not necessarily reflect what each of us as individuals find “moral” or need to confront whether the decision not to parent one's own biological child is indeed a morally positive one,

The image of the deadbeat dad is a compelling one in our culture, defined as a man who refuses to sponsor his biological children.<sup>154</sup> Granted,

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150. Cf. *Fast Facts*, NATIONAL ORGANIZATION FOR WOMEN, <http://www.now.org/issues/mothers/facts.html> (last visited Aug. 27, 2013).

151. See, e.g., 18 U.S.C. § 228 (2013) (commonly called the “Deadbeat Parents Punishment Act of 1998.”); Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (1998).

152. See, e.g., *Birthparents Seeking Adoptive Families*, LIFETIME ADOPTION CENTER, L.L.C., (Oct. 23, 2012, 12:12 AM), [http://lifetimeadoption.com/adoption\\_situations/index.html?nav=none](http://lifetimeadoption.com/adoption_situations/index.html?nav=none) (showing an adoption advertisement in which a birth mother seeks to “bless a family that cannot have a child of their own”). In the case of egg and sperm donation, it has been found that altruistic motives are also cited—though often to a different extent for women and men. It is likely that some of the same reasoning in these studies may be applied here. See generally, Rene Almeling et al., “Why Do You Want to be a Donor?": Gender and the Production of Altruism in Egg and Sperm Donation, 25 NEW GENETICS & SOC'Y 143 (2006).

153. See generally DAVID J. GARROW, *supra* note 44; HULL & HOFFER, *supra* note 44; Warren & Brandeis, *supra* note 44.

154. Bruno, *supra* note 46, at 155.

there are certainly men who fail miserably at fatherhood and should be made to answer for it, but these are not the men who were coerced into parenthood by women and the state. According to the *Casey* Court, “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>155</sup> Men who have no interest in the legal and social responsibilities of parenthood should not be compelled to parent because of an idea that society has about men and responsibility. If a woman chooses to parent against the wishes of her fetus’s biological father, then she alone must bear the responsibilities of that decision.

The state does make its policies in consideration of the nature of the sexual act; however, the causation it employs is incorrect. A policy that abjures the right of men to choose parenthood is based on an idea that the drives of men being what they are, and women being the weaker sex, it only naturally follows that any woman bearing a man’s unwanted child has been victimized. It is not difficult to conceive an image of the poor, single, struggling mother who has been abandoned by her sex partner. No doubt, after shirking off his duties of fatherhood, he is once again out and about in the world, perhaps even impregnating more females whom he will also abandon to their own devices once or even if they become pregnant. This image is very easy to conjure, bolstered by our endless appetite for soap opera television, but it is not indicative of the reality of human nature. The male who goes from female to female with the intention to fertilize and abandon is very much an outlier,<sup>156</sup> and our public policy should not be structured to guard against him. Indeed, if there is a public policy guard against reproduction with this hypothetical poly-fertilizer, it is easy access to contraception and early and safe abortion.

Thus, the retributive nature of coerced parenthood becomes obvious. Because men are beasts with uncontrollable—or at the very least stronger than a typical woman’s—drives, to have fathered an unwanted child certainly means that a violence has occurred.<sup>157</sup> For this, they must answer or take responsibility for their actions.<sup>158</sup> This is nothing more than mere punishment for having engaged in a consensual sexual act.

Indeed, is it any more telling that a man must be prepared to be financially tied to any child conceived for eighteen years or more—even if he was lied to about contraceptive use? Even if a woman and a man engage in consensual sex and she becomes pregnant after leading him to believe that she has employed a contraceptive method, he faces the same social

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155. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992).

156. In fact, currently married men have the highest average number of children, followed by formerly married men. See Gladys Martinez, et. al., *Fertility of Men and Women Aged 15–44 Years in the United States: National Survey of Family Growth, 2006–2010*, p.5.

157. See, generally, *ON HUMAN NATURE*, *supra* note 121.

158. See, generally, *ON HUMAN NATURE*, *supra* note 121.

and legal obligations towards the child.<sup>159</sup> Society still says that because he engaged in this sex act, because he is male, he must “be a man” and answer for his actions.<sup>160</sup> This is done much in the way that one must “answer” for strict liability crimes—even if the act is not done with the specific state of mind to do it, it is still a crime under the law and must be atoned for.<sup>161</sup> That the consequences for engaging in a consensual sex act should be so very high is hard to imagine; that they are only this high for men is a horrendous breach of justice to both men and women.<sup>162</sup>

### CONCLUSION

The sexual liberation aspect that was so integral to women’s liberation movements in the 1960’s and 1970’s focused on women’s ability to control their reproductive destinies.<sup>163</sup> Up to this time, the legal policies that had developed were a direct result of a culturally-permeating patriarchal domination.<sup>164</sup> That men were forced to become legally responsible for the offspring they timely chose not to father was likely a necessary transitional step between patriarchy and gender equality in reproduction. But oppression is dynamic; critical emancipatory struggles should be as well. Now that society has progressed to the point that women are on the brink of becoming truly equal to men,<sup>165</sup> we must recalibrate. Women’s equality can never be premised on an abrogation of responsibility toward men—or vice-versa. Hence, that women inflict upon men a responsibility that they do not fully accept as a consequence of their choices is not in keeping with feminist ideals of equal recognition and moral agency. Though the ‘man-

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159. See, e.g., *Beard v. Skipper*, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990).

160. See, generally, ON HUMAN NATURE, *supra* note 121.

161. See *State v. Polashek*, 646 N.W.2d 330, 336 (Wis. 2002) [need better authority].

162. There is an important due process consideration here. It is accepted that the government must complete proper due process before depriving a person of real property. In *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969), a government policy that allowed garnishment of wages without a hearing was considered to violate due process. Though there is a process for establishing paternity, it does not take into account choice but rather is something automatic once a positive genetic test is performed. “[D]ue process requires, at a minimum, that, absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

163. See, e.g., Rory C. Dicker, *A History of U.S. Feminisms* at 57-60 (2008).

164. *Id.*

165. That women take time off to do work in the household is their own prerogative. If they do not wish to do it, there is ample birth control available and they may at any time insist instead that their husbands stay home. For other options to be available, mothers and fathers must make their needs known in the political system. Children are valuable to a society and single people should subsidize, as a societal effort, parents (and they do to a certain extent already, in the form of taxes for schools and health insurance, etc.). However, that this should be made into a women’s issue, I think, is missing the point. If society as a whole decides that it has a true interest in people raising children, then society will make it possible to do so. It will only be possible for this truly equalizing change to take place when women refuse to sacrifice themselves to childcare and house maintenance.

eating feminist' is a popular caricature, this is not the ideal of women's liberation.<sup>166</sup> Men must be equal to women, and women must be equal to men as free and full-fledged moral agents.

The relationships between men and woman are vastly complex, especially when reproduction and children enter the picture. Among reproductive partners, much of that complexity resolves into constantly evolving mechanisms of cooperation. However, absent the partnership, women must not outsource responsibility for their free and unilateral choices to men, and men may not be under any moral obligation to accept it. On the contrary, if the male partner in reproduction decides in a timely manner does not wish to become a parent, the woman (and the law) must allow him that choice. This is, after all, the same choice that she is given. If, however, the bodily integrity and reproductive autonomy of women are to allow them that unilateral choice, their moral agency requires that they solely bear the burden of the choice.

The ability to maintain autonomy over one's own reproductive choices is a concept affirmed time and again by modern legal and social norms. Up to this point in time, the concept of parental choice has focused on women and their right to abort or bring a fetus to term, give a child up for adoption, access birth control, and so on.<sup>167</sup> This was for very specific historical reasons relating to the needs of women and their empowerment. Now, as late modernity sets in, we must again progress. New progress for equality will only come when society stops taking childbearing for granted and puts in place policies for individuals with and without children that empower their equal moral agency. These might include: free access to contraception, pre-natal care or abortion, access to affordable childcare, paid maternity and paternity leave, and paid sick leave that allow primary caregivers (still most often, but by no means exclusively, women) to function in the workplace and manage their responsibilities toward their offspring.

However, it is wrong to assume that shifting the consequences of providing adequate resources for children to men who women chose to impose parenthood upon is an adequate answer to the societal requirement that children are adequately cared for. Forcing men to become fathers does not mean that children are adequately cared for as there still exists an extraordinary lack of resources for *the family* at large.

In order for women to have meaningful choices, men must also be given choices in becoming a parent. Perhaps this choice will involve considerations of reliance (was the child planned?) or considerations of timing (perhaps it is unfair to the mother if the father changes his mind too late

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166. See, generally, HALLEY, *supra* note 6,

167. See, generally, BINION, *supra* note 139,



into the pregnancy process). The argument that men should be able to change their minds about parenting once they have made clear their intentions to the contrary is not compelling. It may be helpful if fathers were given a deadline for choice, much as mothers are given a deadline for choosing abortion.

A new reproductive policy that gives men a meaningful opportunity to choose whether to become legal and social fathers will inevitably change society. There will certainly be needs to be addressed—from children, mothers, and perhaps fathers. However, in allowing fathers to have the choice to parent or not, the gender imbalance is reduced in favor of women and need can be met without state patronization or coercion of either mother or father. In a world of subtle forms of domination, disrespect for the moral agency of women has taken the form of a privilege in reproductive choices that seems aligned to women's interest. This apparent alignment, however, leads to disempowerment rather than empowerment. At this late stage in modernity, and viewed through the lens of an at once more mature and yet radical commitment to women's liberation, the reproductive privilege discussed in this article does in fact undermine the equal moral agency of women.